

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MADISON ANDERSON,

Plaintiff/Counterdefendant-  
Appellant,

v

MARLIS JEAN CAIN,

Defendant-Appellee,

and

BRAIN LEISURE, INC.,

Defendant/Counterplaintiff-  
Appellee.

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UNPUBLISHED  
December 13, 2002

No. 234581  
Wayne Circuit Court  
LC No. 99-911382-CH

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff/counterdefendant appeals as of right from a final judgment denying his request for specific performance, awarding him \$5,000, and denying defendant/counterplaintiff's counterclaims.<sup>1</sup> We affirm.

**I. Facts and Procedural History**

This case arises out of a contract to purchase a forty-unit apartment building in Detroit. On July 31, 1998, defendant accepted plaintiff's offer to purchase the apartment building.<sup>2</sup> The purchase agreement provided, in pertinent part:

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<sup>1</sup> Defendant Marlis Jean Cain, the sole shareholder of Brain Leisure, Inc., was dismissed from the case by stipulation of the parties.

<sup>2</sup> Plaintiff made two previous offers to purchase the property. Plaintiff's first offer did not involve defendant and plaintiff's second offer was accepted by defendant, but the parties did not follow through on the agreement. These previous offers are not relevant to the issues on appeal.

Purchaser agrees to apply for such mortgage within 5 days from acceptance of this offer at his own expense. If a firm commitment for such mortgage cannot be obtained within (40)30 [sic] days from date of acceptance, at the Seller's option, this offer can be declared null and void and deposit shall be returned.

The purchase agreement also required defendant to furnish plaintiff a title insurance policy "as soon as possible." Under the agreement, "If objection to the title is made," defendant had thirty days either "(1) to remedy the title, or (2) to obtain title insurance as required above, or (3) to refund deposit in full termination of this agreement if unable to remedy the title or obtain title insurance."

Plaintiff subsequently applied for a mortgage and was approved by Franklin Bank. Franklin Bank sent plaintiff at least four commitment letters, stating its commitment to lend plaintiff money to purchase the real estate. However, plaintiff did not sign Franklin Bank's commitment letters or pay the financing fee within forty days or the purchase agreement. Defendant did not furnish plaintiff proof of title insurance because defendant was waiting until plaintiff signed the commitment letter and paid the financing fee before ordering the insurance. After the forty-day period passed, defendant offered plaintiff more time to secure financing, but when plaintiff again failed to sign the commitment letter and pay the financing fee, defendant withdrew its offer to sell the property.

Plaintiff sued defendant for breach of contract and requested specific performance of the July 31, 1998, purchase agreement. Following a bench trial, the trial court issued an opinion denying plaintiff's request for specific performance. The trial court reasoned that defendant properly declared the purchase agreement null and void after plaintiff failed to obtain a firm mortgage commitment within the time required by the agreement. The trial court explained that defendant did not violate the purchase agreement by failing to obtain title insurance because it was generally accepted practice that a seller does not typically order title work until after the purchaser obtains a firm commitment for financing. The trial court then entered a judgment denying plaintiff's claims for specific performance, ordering defendant to return plaintiff's \$5,000 security deposit, and dismissing defendant's counterclaims.

## II. Analysis

### A. Standard of Review

Specific performance of a contract is an equitable remedy. *Rowry v University of Michigan*, 441 Mich 1, 9; 490 NW2d 305 (1992). We review de novo a trial court's decision whether to grant equitable relief, but we review the trial court's findings of fact for clear error. *McFerren v B & B Investment Group*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 230289, issued 10/22/02), slip op at 4, lv pending (Supreme Court Docket No. 122704). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). This case also involves an issue of contract interpretation, which is a question of law that is reviewed de novo on appeal. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

### B. Specific Performance of the Purchase Agreement

Plaintiff argues that the trial court erred in denying his request for specific performance of the July 31, 1998, purchase agreement. The general rule is that a court will not grant specific performance unless the party seeking the decree has tendered full performance. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982). Although plaintiff obtained offers for financing, he never signed the offers, finalized the mortgage commitments, or made any payments. A buyer is not entitled to specific performance when he secures a mortgage commitment and informs the seller that he is prepared to close, but fails to make the necessary payment. *Id.* “An offer to close, unaccompanied by the necessary payment, does not constitute legal tender.” *Id.* Therefore, plaintiff was not entitled to specific performance because he did not tender full performance of the contract.

Plaintiff argues that defendant breached the purchase agreement by failing to furnish proof of title insurance after plaintiff offered to perform the agreement in its entirety. Plaintiff argues that the trial court clearly erred in finding that it was generally accepted practice for the seller to obtain title insurance only after the buyer had a firm mortgage commitment. We disagree. The purchase agreement required plaintiff to secure a “firm commitment” for a mortgage within forty days of the date of acceptance and required defendant to furnish a policy of title insurance “as soon as possible.” Where the terms of a contract are unambiguous, only the language of the contract is used to interpret its meaning. *Dignan v Michigan Public School Employees Retirement Bd*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 231533, issued 10/29/02), slip op at 4. A contract is ambiguous when its words can reasonably be interpreted in different ways. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If the meaning of the contract is ambiguous, the trier of fact must determine the intent of the parties. *Id.* at 492.

The phrase “firm commitment” in the purchase agreement is unambiguous. We agree with the trial court that, because plaintiff did not sign the mortgage commitments or pay the commitment fees within the forty-day period, he merely obtained offers for commitment and did not obtain a “firm commitment” for a mortgage. Therefore, the issue is whether plaintiff was required to get a firm commitment for a mortgage before defendant was required to furnish a policy of title insurance.

Defendant was required to furnish the title insurance “as soon as possible.” This phrase is ambiguous and its meaning must be determined by the factfinder. *Id.* The testimony at trial showed that it was generally accepted real estate practice that a seller does not typically order title work until the buyer obtains a commitment for financing, as opposed to merely obtaining offers for financing. Therefore, we conclude that the trial court did not clearly err in finding that defendant was required to furnish the title insurance policy as soon as possible only *after* plaintiff obtained a firm commitment for a mortgage.<sup>3</sup> Accordingly, defendant did not breach the contract by failing to provide a title insurance policy before plaintiff obtained a firm mortgage commitment. Instead, plaintiff breached the plain language of the contract requiring him to obtain a firm mortgage commitment within forty days. A party may not obtain specific

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<sup>3</sup> Plaintiff never objected to the title, so the defective title provision of the contract was never triggered.

performance if it has breached a material term of the contract. *Sterling v Fisher*, 356 Mich 634, 640; 97 NW2d 64 (1959). Therefore, plaintiff was not entitled to specific performance.

#### C. Mutuality of Remedies

Next, plaintiff argues that the trial court erred in denying his request for specific performance where there was a mutuality of remedies. Plaintiff did not raise this argument in the trial court. “Issues raised for the first time on appeal are not ordinarily subject to review.” *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We decline to address this unpreserved issue.

#### D. Damages

Finally, plaintiff argues that the trial court erred in denying his request for damages resulting from defendant’s delays in performing the agreement. We disagree. A court has considerable discretion in the awarding of damages, even when denying specific performance. *Livingston v Krown Chemical Mfg, Inc*, 50 Mich App 153, 156; 212 NW2d 775 (1973), *aff’d* 394 Mich 144 (1975). In the present case, the trial court properly concluded that defendant did not breach the purchase agreement. Moreover, the trial court ordered defendant to return plaintiff’s \$5,000 security deposit and plaintiff does not point to any other specific damages he suffered. Therefore, the trial court did not err in denying plaintiff’s request for additional damages.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Brian K. Zahra  
/s/ Patrick M. Meter